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Ringers Revisited

Richard H. Underwood[†]

Abstract

In this short essay, Professor Underwood addresses an important development in the law dealing with eyewitness testimony and the New Jersey case of State v. Henderson. He gets at the subject by looking back to a 1950s television play starring fellow Kentucky resident, William Shatner. However, in this particular instance, William Shatner would not change the world.¹

“You say again you are quite sure that it was the prisoner?”

The witness was quite sure.

“Did you ever see anybody very like the prisoner?”

Not so like (the witness said) as that he could be mistaken.

“Look well upon that gentleman, my learned friend there,” pointing to him [co-counsel] who had tossed the paper over [containing a hint for his Leader], “and then look well upon the prisoner. How say you? Are they very like each other?”

....

My Lord inquired of Mr. Stryver (the prisoner’s counsel), whether they were next to try Mr. Carton (name of my learned friend) for treason? But, Mr. Stryver replied to my Lord, no; but he would ask the witness to tell him whether what happened once, might happen twice; whether he would have been so confident if he had seen this illustration of his rashness sooner, whether he would be so confident, having seen it; and more. The upshot of which was, to smash this witness like a crockery vessel, and shiver his part of the case to useless lumber.²

In cases such as this, where the question of guilt or innocence hangs entirely on the reliability and accuracy of an in-court identification, the identification procedure should be as lacking in inherent suggestiveness as possible. Yet that is often not the case. When asked to point to the [perpetrator], an identification witness—particularly if he has some familiarity with courtroom procedure—is quite likely to look immediately at the counsel

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¹ *How William Shatner Changed the World* (Discovery Channel Canada television broadcast Nov. 13, 2005) (a two-hour documentary discussing how the television series *Star Trek* inspired today’s technologies).

² CHARLES DICKENS, A TALE OF TWO CITIES 89-90 (1902) (1859).

table, where the defendant is conspicuously seated in relative isolation. Thus [sic] the usual physical setting of a trial may itself provide a suggestive setting for an eyewitness identification.³

Memory belongs to the imagination. Human memory is not like a computer that records things; it is part of the imaginative process, on the same terms as invention.⁴

Introduction

I am a professor, so here is a “hypothetical” for you.

The defendant was charged with violating 18 U.S.C. § 2314⁵ for causing the interstate transportation of counterfeit securities. Several of the securities in question were forged money orders that a “John Harrison” deposited in the Flatbush Savings Bank in Brooklyn. When several of the money orders returned unpaid, the FBI got involved. Agents obtained a photo of the defendant and arrested him. They showed the defendant’s photo, along with seventeen other photos, to employees of the bank who identified the defendant as the “John Harrison” who cashed the money orders (an out-of-court identification that may have been suggestive). Almost *three years* later, and just a few weeks before trial, the witnesses again made a photographic identification of defendant (another out-of-court identification that may have been suggestive). At the trial, four witnesses gave in-court identifications by going through the do-you-see-the-defendant-in-court-today routine (hint—he is in the defendant’s chair next to the lawyer).⁶

³ *Morton v. Commonwealth*, No. 1554-91-2, 1993 WL 40849, at *3 (Va. Ct. App. Feb. 9, 1993) (Benton, J., dissenting) (quoting *United States v. Williams*, 436 F.2d 1166, 1168 (9th Cir. 1970)) (internal quotation marks omitted), *cert. denied*, 402 U.S. 912 (1971).

⁴ ROBYN M. DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD* 106 (1988) (quoting Interview by Shusha Guppy with Alain Robbe-Grillet, Author, in Paris, France (Spring 1986) (transcript available at <http://www.theparisreview.org/interviews/2819/the-art-of-fiction-no-91-alain-robbe-grillet>)).

⁵ 18 U.S.C. § 2314 (2013).

⁶ The defendant moved to waive his presence in the courtroom, citing FEDERAL RULE OF CRIMINAL PROCEDURE 43, which provides for the trial to proceed although the defendant absconds. Nice try, but motion denied.

One of the witnesses, a bank teller, said that she had seen “John Harrison” at the bank on three or four times different occasions for five or ten minutes each. She said he was about twenty-five years of age and about six feet tall. The following transpired:

The Court: Are you sure that is the gentleman?

Witness: I am sure.

Defense Counsel: Were there any physical characteristics of Mr. Harrison that you remember?

Prosecutor: Objection, your Honor.

The Court: Sustained.

Witness: I’m sorry?

The Court: Don’t answer, please. I sustained the objection to the question.

Defense Counsel: How did Mr. Harrison comb his hair?

Prosecutor: Objection.

The Court: Sustained. She said she is positive that is the man that she understood to be Mr. Harrison. She is positive about it.

Defense Counsel: Were there any—was he wearing glasses at the time you saw him in the bank?

Prosecutor: Objection.

The Court: Sustained.

Defense Counsel: Did you ever have any conversation with this John Harrison in the bank?

Witness: No, not that I remember.

Defense Counsel: Did he ever say anything to you?

Prosecutor: Your Honor—

The Court: Did he ever what?

Defense Counsel: Say anything to you?

Prosecutor: I’m going to object to that. Just answer—

The Court: Sustained.

Defense Counsel: Did you ever say anything to John Harrison?

Prosecutor: Objection, your Honor.

The Court: Sustained. She stated she had no conversation. She can’t remember any conversation.

A bank officer also testified that he had seen “John Harrison” in the bank twice. On the first occasion, he saw “John Harrison” in the bank for about five minutes from twelve to fifteen feet away. On the second occasion, he saw him in the bank for about two minutes from approximately twenty feet. He identified the defendant as the “John Harrison” that he saw in the bank. He also testified that “John Harrison” did not wear glasses when he was in the bank.

Here again is the cross-examination.

Defense Counsel: For how long a period of time, if you added it together, would you say that you observed this gentleman, Harrison?

Prosecutor: Now, your Honor—

Witness: Seven minutes, maybe, all together.

The Court: All right.

Defense Counsel: Did that seven minutes give you any particular impression of Mr. Harrison?

Witness: Well, I wanted to—

Defense Counsel: No. Did it give you any particular impression—

The Prosecutor: Your Honor, I object.

The Court: Sustained.

Witness: I wanted to see—

The Court: No. Don't answer, please.

Witness: I'm sorry.

The Court: I have sustained the objection. We have had the witness's testimony respecting the two occasions that he saw him, one, when he was about twenty feet away, and one when he was about twelve or fifteen feet away, when he was at the window. He observed him on one other occasion for about five minutes.

Those pesky defense lawyers—always wasting time! The witnesses pointed to the right chair. Let us move along now.

It should come as no surprise that this was not at all “hypothetical.” The question-and-answer is real—from *United States v. Fitzpatrick*.⁷ The court reversed the defendant's conviction because of the issues with identification: the witnesses each testified only that they saw “Mr. Harrison” at the bank on a few, very brief occasions from a distance or through a teller's window; there was a thirty-month delay between the arrest and trial; and a second photo identification session between the prosecution and the witnesses occurred only weeks before the trial.⁸ The prosecutor's objections were groundless, and the trial court unfairly and “unreasonably curtailed” the cross-examination.⁹ The appellate judges waxed eloquent on the unreliability of much of the eyewitness testimony, citing the Supreme Court opinion in *United States v. Wade*,¹⁰ Edwin

⁷ 437 F.2d 19, 22-23 (2d Cir. 1970).

⁸ *Fitzpatrick*, 437 F.2d at 21-22, 25.

⁹ *Id.* at 21.

¹⁰ 388 U.S. 218, 228-29 (1967).

Borchard's classic *Convicting the Innocent*,¹¹ a number of celebrated cases of misidentification,¹² and even Lloyd Paul Stryker's comments from *The Art of Advocacy*.¹³

Cases of mistaken identity are always difficult, and yet I believe that had a great advocate been there [referring to the case of Bertram Campbell], he would have cross-examined those identifying witnesses so as to search their consciences and even their souls. He would have shaken them as a terrier throws fear into a rat. Their smug assurance would have vanished; their complacent certainty would have weakened, and perhaps, who knows, they might have been forced to recant their false identification on the witness stand, even as they did seven years later [in the case he was discussing].¹⁴

Eyewitnesses are crucial prosecution witnesses who testify in about a quarter of all cases,¹⁵ but eyewitness identifications made under stressful conditions after a limited period of observation are not very reliable.¹⁶

¹¹ EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932).

¹² *Id.*; see *Fitzpatrick*, 437 F.2d at 23-24 (quoting *Wade*, 388 U.S. at 228) (internal quotation marks omitted) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. . . . The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.").

¹³ *Fitzpatrick*, 437 F.2d at 24-25.

¹⁴ LLOYD PAUL STRYKER, *THE ART OF ADVOCACY: A PLEA FOR THE RENAISSANCE OF THE TRIAL LAWYER* 203 (Neill H. Alford, Jr. et al. eds., Gryphon spec. ed. 2007).

¹⁵ SEYMOUR WISHMAN, *ANATOMY OF A JURY* 178 (1986); see ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 9-10 (1979) (describing a study in which the conviction rate for mock jurors rose fifty percent when an eyewitness identification was provided to them, even though the eyewitness had extremely poor vision).

¹⁶ See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 45-50 (2011). Garrett's book describes the ordeal of a man named Habib Abdal, who was convicted based solely on eyewitness testimony despite changing accounts of the story—saying "his photo looked the closest"—and stark differences between the witness' description and Abdal's physical characteristics. *Id.* Abdal spent sixteen years in prison before he was exonerated by DNA testing in 1999. *Id.*; see also Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 452 (2012) (quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981)) (Brennan, J., dissenting) ("It is all too obvious who the defendant is, sitting at counsel's table. Yet, as Justice William Brennan wrote, '[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"'); Edward Connors et al., UNITED STATES DEPARTMENT OF JUSTICE,

Some courts allow psychologists to testify about the specific capacities of witnesses, such as whether a witness can perceive color, sounds, or distances, but many courts have disallowed these kinds of experts because of the great impact they can have on a jury, and the way they can effectively replace the jury's function of determining the facts.¹⁷

There is also the myth that cross-examination can deal effectively with eyewitness testimony, assuming that the judge will give counsel sufficient leeway to conduct an effective cross-examination.¹⁸ There have been some changes of attitude, but change has come slowly.¹⁹ Furthermore,

CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 34-76 (1996) (descriptions of defendants exonerated by DNA evidence).

¹⁷ WISHMAN, *supra* note 15, at 179.

¹⁸ See Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 728-29 (2007) (noting that counsel's attempts to discredit erroneous eyewitness testimony may prove futile); see also James M. Doyle, *No Confidence: A Step Toward Accuracy in Eyewitness Trials*, THE CHAMPION, Jan. 2001, available at <http://www.nacdl.org/champion/articles/98jan01.htm> (citing R. C. L. Lindsay, Gary L. Wells, & Fergus J. O'Connor, *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 LAW & HUM. BEHAV. 333, 335-37 (1989)) ("Wrong and impeached, the confident eyewitness will probably be believed, and hundreds of innocent defendants will be convicted as a result. . . . [E]xperienced lawyers don't seem to be any better at improving this situation than do third-year law students."). Doyle's article is an excellent discussion of the problem and provides good tactical advice. See also JAMES M. DOYLE & ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 229-30 (LEXIS Law Publishing 3d ed. 1997) (emphasizing the importance of a strong cross-examination of an eyewitness).

¹⁹ See Doyle, *supra* note 18 ("Since *Manson v. Braithwaite*, only a tiny portion of eyewitness identifications are suppressed"). Kentucky will now admit expert testimony regarding factors affecting the reliability of eyewitness testimony. See, e.g., *Commonwealth v. Christie*, 98 S.W.3d 485, 491 (Ky. 2002) ("Thus, the particular facts of this case . . . make exclusion of [the expert's] testimony . . . an abuse of discretion."), *rev'g* Nos. 1998-CA-003025-MR, 1998-CA-003026-MR, 2000 WL 968069 (Ky. Ct. App. July 14, 2000); see also George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 109, 114-15, 120, 124-26, 129-32 (2011) (discussing how the courts frequently rely on cross-examination and "cautionary jury instructions" in place of expert eyewitness testimony); Maureen Stoneman, *United States v. Smith: An Example to Other Courts for How They Should Approach Eyewitness Experts*, 60 CATH. U. L. REV. 533, 544-46, 552, 561 (2011) (discussing the effect of cross-examination on eyewitness testimony); Lauren Tallent, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 WASH. & LEE L. REV. 765, 775-77, 790, 792, 801 (2011) (same).

in-court identifications are treated as little more than theater, or mandatory ritual, although they can have a considerable effect on the jury. The trial judge will allow the play to go forward as a matter, of course. Indeed, even if a pre-trial identification has been found to be unduly suggestive, a trial judge may still permit an in-court identification to be made if he or she concludes that the in-court identification has an origin in an independent source.²⁰ What is a lawyer to do?

Looking Backward

Back in the late 1940s and 1950s, Westinghouse Studio One presented live theater on television.²¹ The live presentations in New York City were preserved in “Kinescope.”²² A recording camera was pointed at the TV screen as the play was acted out, and then that filmed version of the live show was used to present the play in the other time zones.²³ In 1957, Ralph Bellamy²⁴ and two new actors, Steve McQueen and William Shatner, appeared in a play called *The Defender*.²⁵ McQueen, a butcher’s delivery boy, was being tried for the murder of a psychiatrist’s wife.²⁶

²⁰ Garrett, *supra* note 16, at 465; *see, e.g.*, 11 GA. P. Criminal Procedure § 25:63 (2013) (citing *Anderson v. State*, 716 S.E.2d 813, 737-38 (Ga. Ct. App. 2011)). The routine allowance of the in-court identification, made long after the fact and in the most suggestive of circumstances, seems odd in light of FEDERAL EVIDENCE RULE 801(d)(1)(c), which admits a prior identification as non-hearsay on the theory that a prior identification would be more reliable than the in-court identification, being made closer to the events in question.

²¹ *Studio One*, ARCHIVE OF AMERICAN TELEVISION, <http://www.emmytvlegends.org/interviews/shows/studio-one> (last visited July 19, 2013).

²² Larry Wild, *Television: History and Production*, N. ST. UNIV., <http://www3.northern.edu/wild/th100/tv.htm> (last updated June 26, 2013).

²³ *Id.*

²⁴ Younger readers will remember him as Randolph Duke in the insipid but award-winning and profitable Eddy Murphy movie called “Trading Places.” *TRADING PLACES* (Paramount Pictures 1983). The irony of the title “Trading Places” will not be lost on the “hipsters” among you.

²⁵ *THE DEFENDER* (Columbia Broadcasting System 1957). Clips from the 1957 show were included in an episode of *Boston Legal: Son of the Defender* (David E. Kelly Productions 2007). In this silly episode, the son of the murdered woman comes back from the past to terrorize the son of the old defender, again played by Shatner, who is now a senior lawyer looking back at his career and his relationship with his father. *Id.*

²⁶ *THE DEFENDER*, *supra* note 25.

Bellamy played the lawyer appointed to represent him and was assisted by his son, played by Shatner.²⁷ As the trial turned more and more against the defendant, the senior defender was finally persuaded by the younger to switch a somewhat look-alike law student for the defendant.²⁸ That is, the “ringer” sat at counsel table and the defendant was secreted in the spectators’ gallery.²⁹ This led the critical eyewitnesses to misidentify the student as the defendant.³⁰ In a dramatic scene, Bellamy reveals the ruse by presenting the defendant and the student to the jury.³¹

Exactly what the prosecutors were doing while all this was set up is not clear—studying their briefs or fiddling with their ties, perhaps. Although the judge criticized the defenders³² for their tactics, he (unrealistically) directed the acquittal of the defendant.³³ Prosecution-oriented viewers would decry the cheap trick. The older defense lawyer, who is a bit stodgy for my taste, was left to wonder if justice was done and at what price.³⁴ My guess is that most viewers liked the result and thought they were watching real “lawyer stuff.” One wonders how many lawyers watched the show and how many were inspired by it to try the old “switcheroo.”

Of course, the few law students who will read this little Article have taken, or will soon take, a course in Professional Responsibility and will know not to try this trick at home. I should also point out that the *A Tale of Two Cities* scenario did not involve the switcheroo, but rather an

²⁷ *Id.*

²⁸ *Id.* If you watch the play, you will see that at one point the psychiatrist loses it and attacks the defendant, punching and then strangling him. *Id.* That was exactly what was done to the murder victim. *Id.* Does that not suggest another possible defense—that the doctor killed his wife in a rage? That possibility did not occur to the defense.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* The judge in *A Tale of Two Cities* was also hostile. “My Lord being prayed to bid my learned friend lay aside his wig, *and giving no very gracious consent*, the likeness became much more remarkable.” DICKENS, *supra* note 2, at 90 (emphasis added). As I note later on, judges have tended to be rather cavalier about in-court identification evidence and tend to be unsympathetic toward defense requests for experimentation. Perhaps this is so because most of them are former prosecutors?

³³ *Id.*

³⁴ *Id.*

opportunistic courtroom demonstration that involved no deception at all.³⁵ The second seat counsel for the defense just happened to bear a striking resemblance to the defendant, and most everyone was too dense or otherwise occupied to notice it until the second seat, Mr. Carton, decided to get involved in the case and passed a note suggesting the demonstration to his senior.³⁶ How often will that opportunity present itself?

Having so confidently predicted that today's generation will not try this trick, I have to backtrack just a bit. There are more cases involving the switcheroo out there than you might think. Let the fun begin!

The Cases

Many lawyers, and a few professors, for that matter, wonder what was so "wrong" about the switcheroo. In that regard the case of *Kentucky Bar Association v. Taylor*³⁷ is worth a read. I was in Vietnam when this was happening. I was not a lawyer then. The case has a bit of age on it.

Taylor was in hot water for a lot of reasons.³⁸ His attempted switcheroo was only a blip in the lengthy indictment by the watchdogs of the bar.³⁹ He was ultimately reprimanded and suspended for a

³⁵ DICKENS, *supra* note 2, at 89-90. One might profitably compare the facts of *Jones v. State*, 695 P.2d 13, 15-16 (Okla. Crim. App. 1985), which provides us with a variation that does not appear in the legal ethics casebooks. In *Jones*, the prosecution witness identified the defendant's brother, who was seated at the defense table *with the defendant*. *Id.* at 16. The trial judge mistakenly viewed this as a "ringer" case and allowed the state to attempt rehabilitation of the witness by admitting the witness's prior extrajudicial identification. *Id.* (citing *Miskovsky v. State ex. rel. Jones*, 586 P.2d 1104, 1106-1110 (Okla. Crim. App. 1978)). The appellate court ruled that this was not a case involving the "substitution" of a "ringer," and further ruled that where a witness *incorrectly identifies* the defendant in court, evidence of a prior extrajudicial identification is inadmissible to rehabilitate (an interesting ruling?). *Id.* (citing *Hill v. State*, 500 P.2d 1075, 1077-79 (Okla. Crim. App. 1972)). Many courts will admit a prior identification when an eyewitness cannot positively identify the defendant in court. *See, e.g.,* *Marshall v. State*, 522 S.E.2d 273, 274 (Ga. Ct. App. 1999) (quoting *Hatcher v. State*, 334 S.E.2d 709, 711 (Ga. Ct. App. 1985)).

³⁶ DICKENS, *supra* note 2, at 89-90. Presumably the reader will remember that, in the end, Sidney Carton's likeness to the defendant takes a rather unfortunate turn, at least for Carton. *Id.* at 454.

³⁷ 482 S.W.2d 574 (Ky. 1972).

³⁸ *Taylor*, 482 S.W.2d at 578-82.

³⁹ *Id.* at 579.

relatively short time, but not for the trick that interests us.⁴⁰ Turning to the facts of his case, it seems that when his client's case was called, he "moved to the area in front of the [judge's] bench, accompanied by a young man."⁴¹ At this point "Officer Bramble, the prosecuting witness," saw at once that the young man accompanying him "was not the defendant," and alerted the prosecutor.⁴² The judge overheard the discussions and "asked [the defense attorney] if this was the defendant on trial."⁴³ Taylor, the defense attorney, responded evasively with something like "we are ready for trial" or "he is in the courtroom."⁴⁴ He did not answer directly but also did not represent that the young man "was the defendant."⁴⁵ In any event, whatever Taylor had planned did not happen.⁴⁶ The judge ordered the defendant to come forward.⁴⁷ He did, and the case was tried.⁴⁸ While the Bar attempted to punish Taylor for all of this, the judge was not all that helpful.⁴⁹ The judge testified that, although "he 'did not like' what had happened," he did not think it was necessarily improper.⁵⁰ From the reported opinion:

Q—With regard to the charge that Mr. Taylor entered a substitute defendant in your court, at any time during the episode that took place on that particular day, did you come up with the impression or the conclusion that Mr. Taylor was trying to perpetrate a fraud on your court?

A—No, I didn't. As a matter of fact I had the opposite conclusion. Had I thought he was trying to perpetrate a fraud on my court I would have put him in jail right then for contempt.

Q—What was his purpose?

A—I don't know. I can only guess and assume that he was trying to confuse the prosecution witness from the standpoint of the definity (sic) of the defendant. That is what I assumed at the time.

⁴⁰ *Id.* at 584.

⁴¹ *Id.* at 579.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 579.

⁴⁹ *Taylor*, 482 S.W.2d at 580.

⁵⁰ *Id.*

Q—At any time—incidentally how long have you known Mr. Taylor?

A—Well, 15 years, I assume.

Q—Well, at any time since you have been on the bench with the exception of tactics, such as what we're talking in this matter, have you ever had any occurrence or anything that would ever make you question the ethics of Mr. Taylor either as a lawyer or a human being?

A—No, I have never questioned Mr. Taylor's honor or integrity. As you mentioned I have questioned his tactics. I have had my problems with Mr. Taylor and I held him in contempt of court on probably two or three occasions on tactics. Not for fraud or misrepresentation or lying or anything else. I have never had any question. As a matter of fact I think he is an honest man and a man of integrity.⁵¹

The wig for the bar association was not exactly having a perfect hair day, I would say. The Kentucky court found that the conduct in question did not warrant discipline.⁵² There are some lessons here, I suppose. You will probably get caught. It probably will not work. Make sure you do not make any direct misrepresentations.

Now let us fast-forward to 1981 and the leading case—the case that all of the subsequent cases have followed in somewhat knee-jerk fashion. That case is the one that appears in all of the ethics casebooks, *United States v. Thoreen*.⁵³

Well, perhaps we should not move forward quite that fast. In 1966, the American Bar Association (ABA) looked at defense tactics in criminal cases in Informal Opinion 914.⁵⁴ I suspect that not many lawyers tracked ABA informal opinions in those days, but you can retrieve them from several sources.⁵⁵ I must say that this opinion is a bit odd. The question posed (perhaps by a prosecutor, but we do not know from the opinion⁵⁶) was whether a defense lawyer had acted improperly

⁵¹ *Id.* (alteration in original) (internal quotation marks omitted).

⁵² *Id.* at 583.

⁵³ 653 F.2d 1332, 1336-43 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

⁵⁴ ABA Comm. on Prof'l Ethics, Informal Op. 914 (1966).

⁵⁵ See ABA Comm. on Prof'l Ethics, Informal Ops. C230(a)-866 (1975); O. MARU, 1980 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1982); O. MARU, 1970 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1972).

⁵⁶ In Kentucky, where I was chairman of the Ethics Committee for fourteen years, the committee will not issue advisory opinions unless the requestor is asking about his own conduct. We do not want to supply ex parte ammunition for someone to use against an opponent.

when he called four boys before the court knowing that three of the four were not the true defendants.⁵⁷ A jury was sworn “only to qualification.”⁵⁸ As the advocates were given a list of the jurors for voir dire, two cops told the prosecutor “that they couldn’t identify three of the four defendants” (again, you will probably get caught).⁵⁹ During a delay sought by the prosecution, the four boys left.⁶⁰ Later the true defendants came into the courtroom.⁶¹ Defense counsel then asked for a continuance, which was granted.⁶² “[D]efense counsel never made any statements [as to who were the true defendants], and the jury had not been sworn to try that particular case.”⁶³ The opinion continues:

We must assume that the lawyer was responsible for bringing the four individuals into court, when he knew that three of them were not the true defendants. We also must assume that this was a trick to mislead the court and jury. It is not clear, however, what advantage the lawyer sought to obtain. Certainly an acquittal of the three individuals who were not the true defendants would not preclude a subsequent trial of the true defendants.⁶⁴

The committee seemed somewhat baffled by the whole thing, and noted that it presented a question of “first impression.”⁶⁵ On the other hand, the committee members were certain that the lawyer had been unethical.⁶⁶ The *Model Code of Professional Responsibility* had not yet been enacted, but the ABA model oath of admission to the bar promised that the lawyer would “never seek to mislead the Judge or jury by any artifice,”⁶⁷ and Canon 15⁶⁸ of the old Canons said that a lawyer should

⁵⁷ ABA Comm. on Prof’l Ethics, Informal Op. 914 (1966).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ MODEL CODE OF PROF’L RESPONSIBILITY Canon 15 (1980).

not engage in “any manner of fraud or chicanery.”⁶⁹ The conclusion from this somewhat limited analysis was that “if the evidence in a disciplinary proceeding established that the lawyer participated in any way in the substitution of other persons for the true defendants, such would constitute unethical conduct”⁷⁰—end of conversation.

So now for *Thoreen*.⁷¹ This case arose from charges of criminal contempt against a fisherman named Sibbett, who was one of over 240 fishermen who had violated an injunction against salmon fishing—not exactly the crime of the century.⁷² Thoreen, the defense lawyer, hoped that the agent who gave Sibbett a citation for salmon fishing would not be able to identify him in court.⁷³ Thoreen substituted another man who closely resembled Sibbett at the counsel table as if he were the defendant and even dressed him in outdoor gear—denims, clunky shoes, a plaid shirt, and a jacket-vest.⁷⁴ Thoreen placed the real defendant behind the bar in an area where the press usually sat and dressed him in a suit and “large round glasses.”⁷⁵ Thoreen did this without the court’s permission or notifying the prosecution.⁷⁶ The court ordered a separation of

⁶⁹ *Id.*; ABA Comm. on Prof’l Ethics, Informal Op. 914 (1966).

⁷⁰ ABA Comm. on Prof’l Ethics, Informal Op. 914 (1966).

⁷¹ *Thoreen*, 653 F.2d at 1336-43.

⁷² *Id.* at 1336.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*; Let us play dress up. On the games we play, see a particularly amusing anecdote from STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* 236, 244 (2005). This was the scene during the trial of a young woman who was charged with and convicted of murdering a cab driver:

There’s a pen in her hand, a legal pad on the table in front of her. Her pigtailed frame a bright-eyed, cherubic face. Winnie the Pooh, hunched above one breast pocket of her jumper, is gazing at the clutch of balloons above the other breast pocket. [She] also has on a white blouse, crew socks stretched halfway up her calves, and green tennis shoes. . . . She was sixteen when she shot the cabbie in the head with the 357.

. . . .
Before the trial, [the defense lawyer] asked [the judge] to bar the state from introducing any testimony or evidence regarding a certain tattoo on [her] calf. [Defense counsel] knew the state had a photo of the tattoo, taken when [she] was jailed. “To put it bluntly, Judge, it’s a hand holding a penis”

Id. at 236, 244.

⁷⁶ *Thoreen*, 653 F.2d at 1336.

witnesses (exclusion from the courtroom) but the ringer did not move.⁷⁷ As the trial progressed, Thoreen motioned to the ringer as if he was the defendant, had him take notes on the obligatory notepad, and did not correct the court when it referred to the ringer as the defendant.⁷⁸ So, we have misrepresentation here, right? The ruse “worked” this time, and during the trial two of the Government’s witnesses misidentified the ringer as the defendant.⁷⁹ Thoreen then called the real defendant as a witness.⁸⁰ The court called a recess and then allowed the Government to reopen its case so that the government agent who had cited Sibbett for two of the violations could identify him correctly.⁸¹

Thoreen had fallen into a trap of his own making. This was a pure switcheroo, and there *was misrepresentation*.⁸² The issue was clearly

⁷⁷ *Id.*

⁷⁸ *Id.* We all fall for the note-taking bit, do we not? See HENRY BEARD, O.J.’S LEGAL PAD: WHAT IS REALLY GOING ON IN O.J.’S MIND? (1995) (a fictional parody of the notes that O.J. Simpson took during his trial).

⁷⁹ *Thoreen*, 653 F.2d at 1336.

⁸⁰ *Id.* at 1336-37.

⁸¹ *Id.* at 1337.

⁸² *Id.* at 1336. In a short article, Barry Tarlow covers some of the same ground I am covering. See Barry Tarlow, *Too Clever by Half: The Switcheroo with a Twist*, THE CHAMPION, Dec. 2003, available at <http://www.nacdl.org/champion.aspx?id=1228> (available by subscription only). Tarlow emphasizes the importance of misrepresentations as a critical factor in these cases. *Id.* He cites the interesting case of *Kiner v. State of Indiana*, in which a defense lawyer falsely represented that a photograph was of the defendant to get the witness to misidentify the person in the photo as the defendant. 643 N.E.2d 950, 952-53 (Ind. Ct. App. 1994), *reh’g denied*. This is but a variation on our theme. The trial judge was critical of the tactic, citing the *Thoreen* line of cases. *Kiner*, 643 N.E.2d at 953. I mention the case because the court also cited my favorite author (me). *Id.* (citing RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS § 11.8, at 333-34 (1988)). Cf. *People v. Simac*, 641 N.E.2d 416, 421-422 (Ill. 1994) (upholding a direct criminal contempt conviction when the court found intent to obstruct the court through sufficient evidence that the defense counsel substituted an individual who looked similar to the defendant, did not notify the court, and ultimately caused a misidentification by the prosecution’s witness), *reh’g denied*. The majority in *Simac* followed *Thoreen*. *Id.* at 424. Dissenting, Justice Nickels argued that “placing an individual in the defendant’s customary place at counsel’s table, without more, is a sufficient basis from which to infer an intent to hinder or obstruct” justice, or “impugn the integrity of the court.” *Id.* at 424 (Nickels, J., dissenting). He distinguished the case from *Thoreen*, noting that at no time did counsel engage in misrepresentation. *Id.* at 426-27. Also, the record did not reflect that any motion to exclude witnesses was made at the beginning of the trial. *Id.* at 426.

framed—no exit this time. Would the court have mercy and consider this as an effort to “find the truth,” albeit by way of a bit of trickery? I do not know if Judge Tanner had ever seen *The Defender*, but he was neither impressed nor amused.⁸³ He came down hard on Thoreen, holding him in criminal contempt.⁸⁴ He held that Thoreen’s conduct violated several sections of the Code of Professional Responsibility.⁸⁵ The custom was that “only counsel, parties, and others having court permission could sit forward of the rail.”⁸⁶ Moreover, the court reasoned that the separation order applied to the ringer.⁸⁷ The judge also threw in a citation to Informal Opinion 914.⁸⁸ Thoreen was ultimately held in *criminal contempt*.⁸⁹

A defense attorney has no obligation to assist the State by alerting an identification witness as to defendant’s location. . . . In light of the seriousness of allowing an identification based only upon defendant’s placement in the courtroom, defense counsel acted in good faith and on behalf of his client. Such conduct is insufficient to support a charge of contempt.

Id. (citing *People v. Miller*, 281 N.E.2d 292, 294 (Ill. 1972)).

Mention of *Kiner* also gives me an excuse to mention *Doe v. Boland*, in which a lawyer expert witness acting as a defense expert used actual children’s images to demonstrate how computers could transform innocent pictures into child porn. 630 F.3d 491, 493-94 (6th Cir. 2011), *cert. denied*, 2013 WL 497568 (June 17, 2013). This tactic was a bad idea because he was manufacturing child porn in violation of the law. *Doe*, 630 F.3d at 493-94. He got himself sued under the civil penalty provisions of the child pornography statute. *Id.*; see *Lora v. Boland*, 825 F. Supp. 2d 905, 906-907 (N.D. Ohio 2011) (\$300,000 judgment!), *cert. denied sub nom.* *Doe v. Boland*, 2013 WL 497568 (June 17, 2013). “Boland could have [adequately] accomplished the purpose of his testimony without creating child pornography using images of real minors. He could have either used fictitious (e.g., computer-generated) images of children, or pictures of real adults . . .” *Lora*, 825 F. Supp. 2d at 912-13 (emphasis added). Further comment would be superfluous.

⁸³ *Thoreen*, 653 F.2d at 1342-43; see *THE DEFENDER*, *supra* note 25.

⁸⁴ *Thoreen*, 653 F.2d at 1337.

⁸⁵ *Id.* at 1338 (citing WASH. RULES OF PROF’L CONDUCT R. 1-102(A)(4), 7-102(A)(6), 7-106(C)(5) (1979) (discussing fraud, deceit or misrepresentation, creation of false evidence, and failure to comply with known local customs of courtesy)).

⁸⁶ *Id.* at 1341.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1340 (citing ABA Comm. on Prof’l Ethics, Informal Op. 914 (1966)).

⁸⁹ *Id.* at 1342. For a similar case that resulted in an eighteenth-month suspension from the practice, see *In re Gross*, 759 N.E.2d 288, 294 (Mass. 2001). *Cf.* Attorney Grievance Comm’n v. Rohrback, 591 A.2d 488, 492 (Md. 1991) (misrepresentation of client identity to agent conducting presentence investigation). For more on advocacy

So there we have it. The Ninth Circuit affirmed.⁹⁰ Once you have a big, old precedent like this, you can bet that everyone else will follow suit. That is what happened.⁹¹ Lawyers who have repeated Thoreen's conduct were bench-slapped. In *City of Portsmouth, Ohio v. Alexander*,⁹² the defendant was convicted of petty larceny from a grocery store.⁹³ "Unbeknown to the trial court or the prosecution, [defendant's] counsel had requested [defendant's] sister to sit at counsel table with [defendant] being seated in the back row of the spectator section. The officers in their testimony identified the sister as the person they observed at the store and arrested."⁹⁴ After the prosecution rested, the defense lawyer called the sister to disclose the misidentification, then called two character witnesses, and then rested.⁹⁵ After a continuance, the defendant was ordered to sit at counsel table, and the prosecution was allowed to introduce three new witnesses to identify the defendant.⁹⁶ When counsel for the defense asked to call additional witnesses, "the court restricted [additional testimony] to the identification issue only."⁹⁷ On appeal, the defense argued that it should have been allowed to offer these additional witnesses, but the appellate court upheld the trial judge's limitation on the basis that the additional evidence was not "newly discovered or

and contempt, see Ronald Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power*, 14 AM. J. TRIAL ADVOC. 243, 245 (1990) (arguing that "clarify[ing] the law of direct criminal contempt and suggest[ing] guidelines which can provide practitioners with a general knowledge about contempt"); Louis Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743, 743 (1990) (arguing that "any standard for defining contempt that is less restrictive than actual obstruction or the imminent threat of obstruction would be unconstitutionally overbroad").

⁹⁰ *Thoreen*, 653 F.2d at 1342-43.

⁹¹ See *Simac*, 641 N.E.2d at 423-24; *Miskovsky v. Okla. ex rel. Jones*, 586 P.2d 1104, 1106-10 (Okla. Crim. App. 1978); James A. Francque, *People v. Simac: How Much Is Too Much Advocacy?*, 26 LOY. U. CHI. L. J. 793, 804-15 (1995) (discussing courts' treatment of this issue).

⁹² No. 1454, 1984 WL 5611 (Ohio Ct. App. Aug. 23, 1984).

⁹³ *Alexander*, 1984 WL 5611, at *1.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at *1-2.

⁹⁷ *Id.* at *2.

unavailable” for the defense’s case-in-chief.⁹⁸ The defense was stuck with its election.⁹⁹ Again, the defense fell into its own pit.¹⁰⁰ *Thoreen* was cited by the court in support of the outcome.¹⁰¹

*United States v. Sabater*¹⁰² followed the same pattern. The defendant was charged with selling crack cocaine.¹⁰³ After a police officer’s direct examination, counsel substituted defendant’s sister for the defendant and had her wear the blue-striped blazer that defendant wore during the

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ “He that diggeth a pit shall fall into it” *Ecclesiastes* 10:8; *Proverbs* 26:27; *Psalms* 7:5, 57:6. For a really interesting case involving the consequences of the “switcheroo,” see *State v. Rogers*, 2007 WL 3071182 (N.J. Super. Ct. App. Div. Oct. 23, 2007) (per curiam). In this case, the defense lawyer tried the same lame trick, substituting defendant’s brother for the defendant. *Id.* at *2. Predictably, the prosecution saw it coming and the plan could not be carried out (again, you will probably be caught). *Id.* However, the court allowed the prosecution to cross-examine the defendant about the plan and destroy his credibility. *Id.*

Q. Yesterday, it is true, sir, that you tried to switch clothes with another person in the courtroom here to attempt to deceive either the officers o[r] the jury?

A. Not the jury, but the officers.

Q. So you attempted to switch clothes with who?

A. My brother.

Q. And you were going to . . . have him try to come up here and deceive somebody?

A. No. I was just going to sit in the back and see if the officers really knew who I was.

Q. But you changed your mind?

A. Yes.

Q. How far did you get? Did you actually give him your jacket and pants?

A. Yes.

Q. Was he actually sitting in the court at one point in time dressed like that?

A. No.

Q. How far did you get?

A. Outside the door.

Id. During redirect of the defendant, the defendant’s counsel tried to establish that the plan was the idea of the defense counsel and the defendant was not at fault. *Id.* The prosecution objected and the trial judge sustained the objection! *Id.* “Without explanation, the judge concluded that the cross-examination of defendant on this point had not prejudiced him.” *Id.* at *3. The appellate division held that counsel’s ill-conceived plan was *ineffective assistance of counsel*, and that it “so damaged [the] defendant’s credibility as to deny him a fair trial.” *Id.* For another case in which the “switcheroo” cost the client dearly while the lawyers walked away, see Tarlow, *supra* note 82.

¹⁰¹ *Alexander*, 1984 WL 5611, at *3.

¹⁰² 830 F.2d 7 (2d Cir. 1987).

¹⁰³ *Sabater*, 830 F.2d at 8.

officer's direct.¹⁰⁴ The defendant was seated in the back of the courtroom.¹⁰⁵ The officer was then asked during cross if he saw the same people in the courtroom.¹⁰⁶

Asked "Where are they?" the witness replies, "Seated at the [defense] table."

"Is that both the people you are talking about?"

"Yes."

Defense counsel then asks the court "to take recognition" that the police officer had not identified his client.¹⁰⁷

The trial judge then ordered a recess to discuss what had happened.¹⁰⁸ Expressing the view that he "would almost label [counsel's conduct] unethical" (he was not impressed by defense counsel's claim that he had done it before in other trials), "[h]e ruled that he would place the defendant and her sister together and would then direct [the officer] to make an identification."¹⁰⁹ He also informed the jury that a substitution had previously been made by defense counsel.¹¹⁰ "No objection was made to [the judge's] statement."¹¹¹ Defense counsel belatedly argued on appeal that the sister still had the blazer on, which allowed the jury to infer from the officer's earlier testimony on cross and the judge's clarifying statements to the jury that it was still the sister and not the defendant who wore the blazer.¹¹² However, it was too late to argue that on appeal.

The appellate court opined:

"When a defendant is sufficiently aware in advance that identification testimony will be presented at trial and fears irreparable suggestivity, as was the case here, his remedy is to move for a line-up order to assure that the

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 9.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 10.

identification witness will first view the suspect with others of like description rather than in the courtroom sitting alone at the defense table.”

....
 “A fairly short delay of proceedings was all that would have been required to rearrange the seating in the courtroom and to secure the presence of some people of the defendant’s approximate age and skin color. While it was not necessary for the court to conduct a true *Wade*-type of lineup, these relatively minor steps were required to ensure that the identification was not unfair.”¹¹³

That sounds pretty good at first, *but have judges really been open to in-court line-ups?*¹¹⁴ Furthermore, *how effective can an in-court line-up be once everyone knows what is happening?*¹¹⁵ Regarding the first

¹¹³ *Id.* at 9 (quoting *United States v. Brown*, 699 F.2d 585, 594 (2d Cir. 1983); *United States v. Archibald*, 734 F.2d 938, 942 (2d Cir.), *reh’g denied*, 756 F.2d 223 (2d Cir. 1984)) (referencing *United States v. Wade*, 388 U.S. 218, 228 (1967)).

¹¹⁴ *See, e.g., Hartsfield v. State*, 722 P.2d 717, 719-20. (Okla. Crim. App. 1986) (holding there was no *true* question of identity, so the defendant was not entitled to sit somewhere in the courtroom other than at the defense table).

¹¹⁵ *See United States ex rel. Littlejohn v. Lefevre*, No. 93 CIV. 3416 (VLB), 1994 WL 24656, at 1 n.1 (S.D.N.Y. Jan. 24, 1994) (citing *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981)) (“Advance court approval has been deemed necessary to the propriety of [the switcheroo], *although it might lead to defeating of its purpose unless obtained through an otherwise dubious ex parte request.*”), *cert. denied*, 455 U.S. 938 (1982). In the habeas corpus proceeding, there was a question of the reliability of an eye-witness. *Id.* at *1. The court observed that “[n]o effort [was made] to arrange any pragmatic test of the witness’s identification, such as [a] court-supervised lineup.” *Id.* (citing *Brown*, 699 F.2d at 593-94; *Archibald*, 734 F.2d at 942-43). The court went on to say:

Another effective method never attempted or requested would be substituti[ng] the person sitting at the usual defense seat at counsel table. Advance court approval has been deemed necessary to the propriety of such procedure, although it might lead to defeating of its purpose unless obtained through an otherwise dubious *ex parte* request.

Id. at n.1. Others reject the notion:

[R]evealing [a plan for] substitution in advance [will defeat the purpose, or] compromise the prosecutor by forcing him to choose between revealing the trick to the state’s identification witness or remaining silent and potentially losing the case as a result. . . . Courts and opposing counsel routinely learn of a lawyer’s tactics in advance by way of pre-trial motions and arguments and still honor their professional obligations to the fullest. Courts continue to rule fairly and opposing counsel do not refer to evidence or matters that they know to be off limits.

Douglas Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor*

question, consider *Morton v. Commonwealth*.¹¹⁶ The defendant was “charged with possession of cocaine with the intent to distribute.”¹¹⁷ The defense “filed a motion in limine requesting that the investigating officer be required to identify the perpetrator in a non-prejudicial setting, such as a lineup.”¹¹⁸ The motion was denied, and his appeal based on the denial failed.¹¹⁹ The court of appeals gave the matter short shrift:

We know of no statutory requirement or established rule of practice which requires a lineup on demand. Therefore, we hold that a motion for a lineup, or for any other procedure to test a witness’ ability to identify the accused, is addressed to the sound discretion of the trial court in the performance of its duty to afford a fair trial.¹²⁰

In a strong dissent, Judge Benton pointed out that there were grounds for questioning the trustworthiness of this particular in-court identification, including the fact that the defendant would produce alibi witnesses and that the officer had given a prior inconsistent statement relating to the defendant’s appearance.¹²¹ He noted that the Commonwealth’s argument was simply that the trial court “had no authority to order a lineup” and that the officer’s testimony “would be trustworthy because the officer would be testifying under oath.”¹²² The judge “denied the motion for a pre-trial lineup because ‘this would set an incredible precedent’” and because the officer was a trained observer.¹²³

Citing *Thoreen* and other cases, the dissent pointed out that a witness’s credibility might be tested by notifying the court and counsel that identification is at issue and seek permission to seat two or more persons

Tricks, 34 TEX. TECH. L. REV. 3, 57-58 (2002). I will let the reader choose his side in this debate.

¹¹⁶ No. 1554-91-2, 1993 WL 40849 (Va. Ct. App. Feb. 9, 1993).

¹¹⁷ *Morton*, 1993 WL 40849, at *1.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at *2.

¹²¹ *Id.* at *2-3 (Benton, J., dissenting).

¹²² *Id.* at *3 (Benton, J., dissenting).

¹²³ *Morton*, 1993 WL 40849, at *3 (Benton, J., dissenting).

at counsel table without identifying the defendant,¹²⁴ as was done in *Jones v. State*¹²⁵; have no one at counsel table; or hold an in-court lineup.¹²⁶

Unfortunately, the majority's decision in this case to uphold the trial judge's erroneous reason for denying a prehearing identification procedure further limits the range of options available to assure that identification of a defendant as the perpetrator is based on actual recognition by the witness and not merely because the witness knows where the defendant will be seated in the courtroom.¹²⁷

Returning to the second question, in my opinion, lawyers on the defense side of the "v." are entitled to be a bit skeptical of prosecutors' willingness to play fair. Bennett Gershman has pointed to several recent Supreme Court cases in which the testimony of key identification witnesses appears to been heavily coached.¹²⁸ "[T]hey provide a devastating commentary on the artificiality of courtroom testimony by eyewitnesses"¹²⁹

Looking Forward

All of this has been fun, but what is the point? I am not expecting courts to repudiate *Thoreen*. But I am suggesting—hardly an original thought—that judicial attitudes toward eyewitness evidence, particularly in court identifications, must change. Cross-examination may be rough and sometimes over-the-top, and there may be some legitimate concern about lawyer "tricks" (although the "tricks" seldom succeed in the real

¹²⁴ *Id.* at *4 (Benton, J., dissenting).

¹²⁵ 695 P.2d 13, 16 (Okla. Crim. App. 1985); see also discussion *supra* note 35.

¹²⁶ *Morton*, 1993 WL 40849, at *4.

¹²⁷ *Id.*

¹²⁸ Bennett L. Gershman, *The Eyewitness Conundrum: How Courts, Police and Attorneys Can Reduce Mistakes by Eyewitnesses*, 81 N.Y. ST. B. J. 24, 27 (Jan. 2009) (citing *Banks v. Dretke*, 540 U.S. 668, 677, 685, 705 (2004), *cert. denied sub nom. Banks v. Thaler*, 130 S. Ct. 2092 (2010); *Strickler v. Greene*, 527 U.S. 263, 272-75 (1999); *Kyles v. Whitley*, 514 U.S. 419, 443, 454 n.14 (1995)).

¹²⁹ *Id.* at 27 n.61 (citing Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685 (2006)) ("It should be noted that the prosecutor in each of the above cases not only engaged in impermissible witness coaching but also withheld exculpatory evidence that would have severely discredited the witnesses' testimony.").

world), but all of that seems to pale in significance when compared to the devastation wrought by unreliable eyewitness testimony.

The judicial response to the problem has been a mixed bag. For many of us, the United States Supreme Court's recent opinion in *Perry v. New Hampshire*¹³⁰ was a disappointment. Although the Court nodded favorably in the direction of more expert testimony and cautionary instructions as a partial remedy,¹³¹ it reaffirmed the use of *Manson v. Braithwaite*'s¹³² so-called reliability indicators, one of which is witness confidence.¹³³ However, there is an abundance of scientific evidence that witness confidence has little correlation to the accuracy of eyewitness identifications.¹³⁴ Furthermore, the Court took its eye off the reliability ball by taking a Fourth Amendment style approach to suppression.¹³⁵ A pre-admission ruling on reliability will only be required if a suggestive pretrial identification was arranged by law enforcement.¹³⁶ The reasoning is that the Due Process Clause is only implicated if government agents were involved.¹³⁷ The emphasis, then, is on police deterrence rather than reliability.¹³⁸ Unnecessarily suggestive circumstances injected by other

¹³⁰ 132 S. Ct. 716 (2012).

¹³¹ *Perry*, 132 S. Ct. at 724. I note in passing that cautionary instructions may push jurors in the wrong direction. See Doyle, *supra* note 18 (discussing *United States v. Telfaire*, 469 F.2d 552, 556 (D.C. Cir. 1972)).

¹³² 432 U.S. 98 (1977).

¹³³ *Perry*, 132 S. Ct. at 724 (citing *Manson*, 432 U.S. at 107, 109, 112-13).

¹³⁴ See Doyle, *supra* note 18.

¹³⁵ *Perry*, 132 S. Ct. at 718-19.

¹³⁶ *Id.* at 730. Justice Sotomayor, the only trial judge on the bench, dissented. See *Perry*, 132 S. Ct. at 730-40. For a sample motion and memorandum of points and authorities after *Perry*, see *United States v. Villareal*, No. 08-cr-1332 JAH, 2012 WL 3734264 (S.D. Cal. Apr. 30, 2012). The motion and memorandum also deal with the separation and exclusion of witnesses and related problems, which are addressed in Richard H. Underwood, *Following the Rules: Exclusion of Witnesses, Sequestration, and "No-Consultation" Orders*, 35 AM. J. TRIAL ADVOC. 513 (2012).

¹³⁷ *Perry*, 132 S. Ct. at 728.

¹³⁸ See Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform*, 90 DEN. U. L. REV. 331, 345-46 (2012) (Despite the fact that jurors must weigh the reliability of eyewitness testimony, they "generally show a poor understanding of scientific research on whether and how eyewitness testimony is reliable."); *Perry v. New Hampshire*, 132 S. Ct. 716, 731, 734 (2012) (Sotomayor, J., dissenting) (stating that the majority's opinion "recasts the driving force of our decisions as an interest in police deterrence, rather than reliability")

witnesses or by social media will not provide a basis for suppression.¹³⁹ It is worth noting, too, that suppression is rare, even when government agents were involved.¹⁴⁰ The eyewitness identification testimony will usually come in. Given the low probability of exclusion even when government agents are involved, plus the continued admission of in-court identifications under the “independent source” rule,¹⁴¹ *Perry*’s approval of expert testimony and cautionary instructions pays lip service to the problem of wrongful convictions attributable to eyewitness testimony.¹⁴²

This brings us to the important, if not entirely satisfactory, New Jersey case of *State v. Henderson*.¹⁴³ The production of commentary on the case is something of a growth industry, so my discussion of the case will be limited.

Only a year before *Perry*, the New Jersey Supreme Court changed the rules for the admission of eyewitness testimony by taking account of the scientific research since *Manson*.¹⁴⁴ The hook for this reevaluation of standards was the due process language of the state constitution.¹⁴⁵ The court discussed a number of “estimator variables,” including visibility, age of the witness, lighting and the like, and “system variables” such as

by “categorically exempt[ing] all eyewitness identifications derived from suggestive circumstances that were not police-manipulated—however suggestive, and however unreliable—from our due process check.”).

¹³⁹ See Deborah Davis & Elizabeth Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769, 779-80, 783 (2012) (citing *Perry*, 132 S. Ct. at 721).

¹⁴⁰ See *id.* at 776 (citing GARRETT, *supra* note 16, at 77) (“[S]uppression motions were heard for 58 of the 161 cases he reviewed, and while many of these cases entailed manifestly unreliable witnesses and strongly suggestive identification procedures, *none of the motions for suppression were granted.*” (emphasis added)).

¹⁴¹ Garrett, *supra* note 16, at 476-82.

¹⁴² See *id.* at 495-97 (quoting *Perry*, 132 S. Ct. at 727) (“[T]he Court blithely noted . . . that ‘all in-court identifications’ involve ‘some elements of suggestion,’ identifying this as one reason to leave the problem of unreliable eyewitness identification evidence to the states and to jurors.”).

¹⁴³ 27 A.3d 872 (N.J. 2011); see *Evidence—Eyewitness Identifications—New Jersey Supreme Court Uses Psychological Research to Update Admissibility Standards for Out-of-Court Identifications—State v. Henderson*, 27 A.3d 872 (N.J. 2011), 125 HARV. L. REV. 1514 (2012) (proposing a standard for suppression of eyewitness identification based solely on reliability rather than suggestiveness).

¹⁴⁴ *Henderson*, 27 A.3d at 922.

¹⁴⁵ *Id.* at 919 n.10 (citing U.S. CONST. amend. XIV, § 1; N.J. CONST. art. 1, § 1).

police procedures and police interaction.¹⁴⁶ The opinion was well received by academics, and it generally assumed that the opinion will encourage other state courts to introduce more stringent standards for the admissibility of testimony tainted by unnecessarily suggestive police procedures and police interaction.¹⁴⁷ On the other hand, the focus was still on the conduct of government actors; and we still have the problem of jury overestimation of the probative value of in-court identifications.

A companion case, *State v. Chen*,¹⁴⁸ is also noteworthy because the New Jersey Supreme Court took things one step further and held that the words and conduct of a private actor, the victim's husband, should also be considered "highly suggestive" and justify a pre-trial hearing "to assess the admissibility" of his wife's identification of the defendant—the husband's former girlfriend.¹⁴⁹ The husband had shown the wife pictures of the defendant to help her make her identification.¹⁵⁰ The trial court decided not to hold a so-called *Wade* hearing "because no government officer had acted in a suggestive manner."¹⁵¹ Although the court stuck to its earlier precedents holding that due process concerns were not triggered in the absence of government conduct, the court returned to the notion that reliability, and not just police deterrence, should be "the linchpin in determining the admissibility of identification testimony."¹⁵² A *Wade* hearing was not required, but the courts still have a "gatekeeping role" to perform.¹⁵³ "Even if evidence has probative value [and passes

¹⁴⁶ *Id.* at 895, 904-10. In other words, "estimator variables" are those that the criminal justice system cannot control, while "system variables" are those factors that the legal system can control. *Id.* at 895.

¹⁴⁷ See Garrett, *supra* note 16, at 457, 488 (quoting Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987)) (citing *Henderson*, 27 A.3d at 292-93) ("The *Henderson* decision in New Jersey, while not perfect, provides a 'social science framework' for encouraging proper lineups in the first instance, evaluating eyewitness evidence at hearings pretrial, admitting them in court, and instructing jurors on how to weight eyewitness identifications.").

¹⁴⁸ 27 A.3d 930 (N.J. 2011).

¹⁴⁹ *Chen*, 27 A.3d at 944.

¹⁵⁰ *Id.* at 932.

¹⁵¹ *Id.*; see *United States v. Wade*, 388 U.S. 218, 242 (1967) (requiring a hearing regarding "whether . . . in-court identifications [have] an independent source, or whether, in any event, the introduction of the evidence was harmless error").

¹⁵² *Chen*, 27 A.3d at 936-37 (quoting *Manson*, 432 U.S. at 114).

¹⁵³ *Id.* at 937.

the relevance test], it may still be excluded [by virtue of New Jersey Evidence Rule 403 (like its federal counterpart)]” if the probative value of the evidence is substantially outweighed by “the risk of . . . undue prejudice, confusion of issues, or misleading the jury.”¹⁵⁴ The court also alluded to the requirement that the eyewitnesses’ testimony be based on their own personal knowledge (Rule 602) and “their ‘opinions or inferences’ must be ‘rationally based on *their* perception’” (Rule 701).¹⁵⁵ The court also noted New Jersey precedent for pretrial Rule 104 hearings on the reliability of children’s testimony that might have been affected by “coercive or unduly suggestive” interrogation and “the reliability of polygraph evidence,” even when stipulated.¹⁵⁶ Finally, the court emphasized that the vast body of scientific literature cited in *Henderson* also established the suggestive effects of private actors.¹⁵⁷ Indeed, the court pointed to a Model Jury Charge that instructs the jury to consider the effects of “‘opinions, descriptions or identifications given by other witnesses, . . . photographs or newspaper accounts, or . . . any other information or influence that may have affected the independence of his/her identification.’”¹⁵⁸ The court cited scientific literature and expert testimony that private actors can affect witness confidence and influence memory and recall.¹⁵⁹ The New Jersey Supreme Court took the bold step that the United States Supreme Court was not willing to take—to conclude that “‘basic fairness’ required a pretrial hearing” on admissibility “when a defendant has made a threshold showing of impermissible suggestiveness” by a private actor.¹⁶⁰ On the other hand, the court did hold that when there is no police action a higher initial threshold—“evidence of *highly* suggestive circumstances”—must be met.¹⁶¹

¹⁵⁴ *Id.* (quoting N.J. R. EVID. 403).

¹⁵⁵ *Id.* (quoting N.J. R. EVID. 701) (citing N.J. R. EVID. 602).

¹⁵⁶ *Id.* (citing N.J. R. EVID. 104; *State v. Michaels*, 642 A.2d 1372, 1380 (N.J. 1994)).

¹⁵⁷ *Id.* at 938.

¹⁵⁸ *Id.* (quoting *Henderson*, 27 A.3d at 907-08).

¹⁵⁹ *Id.* at 939 (citing C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPLIED PSYCHOL. 714, 714 (1994)).

¹⁶⁰ *Id.* at 940.

¹⁶¹ *Id.* at 942-43.

Conclusion

We know that eyewitness identifications are often unreliable evidence, and we know that they have a tremendous impact on jurors. We also know that in-court identifications are made in a particularly suggestive context. Some courts are taking the wealth of social science research into account and admitting expert testimony regarding the fallibility of eyewitness identifications, and fashioning jury instructions to reflect this research. Some are also considering procedures for testing the reliability of eyewitness identifications made prior to trial, although the Supreme Court decision in *Perry v. New Hampshire*¹⁶² was rather retrograde. However, the problem of the dramatic in-court identification remains. Even if an out-of-court identification is suppressed, what is the point if an in-court identification is going to be allowed almost as a matter of course under the independent source rule? Given the hostility of at least some trial judges to pointed cross-examination and apparent concern for lawyer “tricks,” will judges consider exclusion of in-court identifications? Will they at least give counsel more leeway in the courtroom instead of routinely denying in-court lineups and the like under the rubric of discretion? Are we going to continue to worry more about “tricks” than justice?

¹⁶² 132 S. Ct. 716 (2012).